BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PATRICIA GRIFFITH	)	
Claimant	)	
	)	
VS.	)	
	)	Docket No. 1,012,810
WOLF CREEK NUCLEAR	)	
OPERATING CORPORATION	)	
Self-Insured Respondent	)	
	)	

ORDER

Both Parties requested review of the April 22, 2009 Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on August 21, 2009.

APPEARANCES

Frank D. Taff, of Topeka, Kansas, appeared for the claimant. John D. Jurcyk, of Roeland Park, Kansas, appeared for self-insured respondent (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, after the conclusion of the parties' oral argument, the Board asked the parties to submit supplemental briefs on the issue of timely written claim as respondent had referenced a case[1] during argument that had not previously been cited or discussed. The Board considered those briefs as well.

ISSUES

The ALJ found that the claimant was permanently and totally disabled as a result of her series of compensable repetitive injuries to each of her upper extremities which

[1] *Pence v. Rescar, Inc.*, No. 1015047, 2007 WL 435887 (Kan. WCAB Jan. 31, 2007).

culminated in an accident on September 23, 2002, claimant's last date of work.[2] The ALJ specifically found that claimant's written claim was timely and that she was entitled to all of the temporary total disability (TTD) that was paid to her.

Respondent appealed this Award and asserts a number of errors. First and foremost, respondent argues that the ALJ erred in his conclusions with respect to timely written claim. And based on that argument alone, the Award should be reversed. Alternatively, respondent contends claimant failed to establish that she sustained a series of work-related injuries. Respondent asserts that claimant's upper extremity complaints are nothing more than the residual problems related to idiopathic ganglion cysts dating back to 1992. And even if claimant is found to have a compensable injury, her impairment should be modified to reflect no more than a 5 percent impairment on the left and a 7 percent permanent impairment on the right.[3] Respondent also urges the Board to modify the ALJ's finding on the issue of TTD, by modifying the Order to grant respondent reimbursement for any TTD benefits beyond November 4, 2005, the date respondent contends claimant reached maximum medical improvement (MMI).[4]

Claimant contends that the Award should be affirmed in all respects.[5]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

This is the second time this claim has been appealed. At its first presentation, the appeal was from a preliminary hearing order and the only issue was whether claimant had met the timely written claim requirements of K.S.A. 44-520a. The ALJ concluded that claimant had met the statutory requirements and granted benefits. That issue was

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[2] This claim involves a series of injuries spanning a period of time from 1992 to September 23, 2002. Although the Legislature amended K.S.A. 44-508(d) in 2005 and that amendment altered the legal analysis used to determine a claimant's accident in repetitive injuries, this claim predates that amendment to the statute. Thus, the applicable law is set forth in *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[3] Both of these ratings are to the upper extremity.

[4] Respondent contends claimant was overpaid TTD benefits from November 4, 2005 to April 18, 2008.

[5] Claimant initially cross appealed, but at oral argument, announced that she was abandoning those issues and merely asked the Board to affirm the Award as issued.

appealed and a Board Member[6] affirmed the ALJ's conclusion.[7] The claim proceeded to a Regular Hearing on October 12, 2008.

Claimant's relevant medical history dates back to 1992, when she began to experience tendonitis in her right hand and wrist and a ganglion cyst in her left wrist. She believed these problems to be work-related and repeatedly discussed this with her supervisors. According to claimant, she was off work for a week beginning July 22, 1992 and was referred to Dr. White for further evaluation and treatment. Respondent has always denied this was a work-related injury and directed claimant to submit her bills for her multiple surgeries to her left hand to her private health insurance carrier. Even so, respondent filed an employer's report of accident on August 3, 1992 for the ganglion cyst.

Claimant continued her regular work duties as a data entry clerk, a highly repetitive and hand intensive job, with a splint on her left hand and her bilateral problems continued. She sought treatment in 1995 with Dr. Michael Kennedy who referred her to Dr. Richard Bene. In his June 28, 1995 report Dr. Bene opined that claimant's left wrist needed to be surgically explored.[8] Again, respondent denied her condition was work-related. Claimant even gave Dave Reynolds, a supervisor, a note along with the corresponding bills indicating that this "pertains to Workers Comp."[9] But respondent did not authorize their payment under workers compensation and her bills were paid by her private health carrier.

Dr. Bene's report was given to respondent's human resources department. On July 11, 1995, a telecopy transmittal was provided to Dr. Kennedy advising that claimant's upper extremity complaints were not considered compensable. Claimant responded by providing a handwritten note to Dave Reynolds dated September 19, 1995 which indicated that Dr. Bene's bill "was suppose [sic] to go directly to Wolf Creek as it pertains to workers' comp." That note prompted a response from Mr. Reynolds who advised claimant that "Bob [Compton, claimant's supervisor] determined this medical condition was not a work related disability and services provided would not be filed under our Kansas Workers Compensation plan."[10]

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[6] Pursuant to K.S.A. 44-551(i)(2)(A), preliminary hearings are decided by one Board Member.

[7] Board Order, No. 2004 WL 485738 (Kan. WCAB Feb. 20, 2004).

[8] After removing one of the ganglion cysts, a physician purposely left some mesh material ostensibly to inhibit the growth of another cyst. Based upon Dr. Bene's, this was a totally unorthodox method of treatment and the mesh needed to be removed.

[9] P.H. Trans. (Dec. 18, 2003), Cl. Ex. 1 at 2 (Sept. 19, 1995 note).

[10] *Id.*, Cl. Ex. 1 at 1 (Sept. 21, 1995 letter).

From that point on until she was terminated on September 23, 2002, claimant continued working for respondent, performing her normal clerical duties and her condition continued to worsen. Dr. Kennedy continued to treat claimant and he issued a letter dated August 24, 1997 which indicates that claimant has "frequent episodes of tendonitis."[11] He went on to say that "activities that would tend to cause aggravation would be typing, writing, and keyboarding. Bracing, cold-packs, and anti-inflammatory medications would be the treatment for this."[12]

Claimant's symptoms continued and she continued to tell those above her in the supervisory chain of her problems. She wore splints on her hands and at times on her elbows while working. By April 3, 2001, claimant was being treated by Dr. Shari Quick for upper extremity complaints. Claimant was eventually diagnosed with bilateral carpal tunnel syndrome, lateral epicondylitis and myofascial pain syndrome secondary to the carpal tunnel condition. Diagnostic tests were recommended.

Claimant was terminated from her job on September 23, 2002 for falsifying records relating to her absences. Claimant doesn't seem to dispute the propriety of her firing. She filed her E-1 with the Division of Workers Compensation on September 17, 2003, alleging a series of microtraumas beginning in 1992, and continuing through her last day worked of September 23, 2002. The E-1 claimed repetitive use to the wrists and upper extremities.

The filing of the claim and a request for ongoing treatment followed by respondent's denial of compensability prompted a preliminary hearing. As noted before, the ALJ and a Board Member[13] concluded claimant's complaints were compensable and timely asserted. Medical treatment with Dr. Richard J. Bene was authorized. Dr. Bene surgically removed the mesh in claimant's left wrist and over the course of the next few years, claimant underwent carpal tunnel surgery to her right wrist, a neurectomy of the left radial sensory nerve, injections to both her elbows and eventually another ganglion cyst was removed on the right. She currently receives pain management and is under restrictions from Dr. Bene for conditions related to both upper extremities. Dr. Bene indicated that claimant is unable to use her right upper extremity for any repetitive activities and due to her left upper extremity injuries claimant is unable to use that extremity for "any work related activities because of the amount of pain and sensitivity that she experiences."[14]

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[11] *Id.*, Cl. Ex. 2 (Aug. 24, 1997 letter).

[12] *Id.*

[13] Pursuant to statute 44-551(b)(2)(A) now 44-551(i)(2)(A), this decision was preliminary in nature and was made by a single board member.

[14] Bene Depo., Ex. 1 at 2 (July 29, 2008 letter).

Dr. Bene was asked to rate claimant's permanency and speak to the issue of causation. He testified that claimant bore a 5 percent permanent partial impairment to the left upper extremity and a 7 percent permanent partial impairment to the right upper extremity. In that same deposition, Dr. Bene was asked about the causal connection between claimant's work and her bilateral conditions.

> I think that her - - certainly her initial ganglion, which I believe had been treated as a work-related phenomenon, was -- her subsequent problems were related to those surgeries. And in that regard I think they were linked to her - - her work.
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> She did do repetitive activity and I think that is responsible for her -- at least play a large role in her carpal tunnel syndrome and the mass that she had on her -- on her wrist.[15]

Dr. Bene was not willing to say whether claimant was permanently and totally disabled, deferring that determination to others. He did, however, impose restrictions. He determined claimant is "unable to use her [left] extremity for any work related activities because of the amount of pain and sensitivity that she experiences."[16] Dr. Bene also declared that claimant is "essentially unable to work primarily because of the problems related to her painful left wrist. With regard to her right wrist, she would be limited to no repetitive activities of the right upper extremity."[17]

At respondent's request, claimant was evaluated by Dr. Anne Rosenthal, in October 2008.[18] Dr. Rosenthal indicated that claimant's problems were not vocationally related. She opined that "[c]learly, the cause of her problems is the initial ganglion surgical intervention with recurrence of the ganglion and then mesh placement."[19] Dr. Rosenthal refused to offer any opinion as to claimant's permanency or the need for restrictions as claimant had not had any sort of functional capacity evaluation. It is also worth noting that Dr. Rosenthal did not seem to believe claimant's complaints were credible and she

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[15] *Id.* at 52-53.

[16] *Id.*, Ex. 1 at 2 (July 29, 2008 letter).

[17] *Id.*, Ex. 1 at 3 (July 2, 2008 letter).

[18] Dr. Rosenthal conducted her examination on October 31, 2008 and her report was tendered to claimant's counsel on November 18, 2008. Neither party made the timeliness of the production of this report an issue during argument before the Board nor was it argued in any of the parties' briefs to the Board. Thus, the Board will not consider this argument. The Board notes that the ALJ ruled on claimant's objection (at Dr. Rosenthal's deposition) to the report, pursuant to K.S.A. 44-515. The ALJ found the report had been timely produced but the Board notes that the ALJ's calculation of the time was in error. Pursuant to K.S.A. 60-206(a) intervening Saturdays, Sundays and holidays are to be included when computing deadlines that are 11 days or more, as is the case in K.S.A. 44-515.

[19] Rosenthal Depo., Ex. 2 (Oct. 31, 2008 report).

specifically noted claimant's unwillingness to let her conduct the physical portion of the examination. She believed claimant's demonstrated significant symptom magnification and her individual complaints of pain were inconsistent. Dr. Rosenthal made it a point to watch claimant walk to her car (without claimant being aware) and believes claimant had removed her TENS unit and was having no difficulties.[20]

Dr. Lynn Ketchum was appointed to conduct an independent medical examination and concluded "[i]t is my opinion, within a reasonable degree of medical certainty, that the work activities that Ms. Griffith did at Wolf Creek Nuclear Corporation were the proximate cause of Patricia Griffith's injuries as of 1993 to the present."[21] He went on to assign her a 25 percent permanent partial impairment to the left upper extremity and a 10 percent permanent partial impairment to the right upper extremity. Dr. Ketchum indicated that claimant should limit herself to one-handed work with the right hand if she performs any work at all as she can't use her left hand productively in his opinion.

At claimant's request, she was evaluated by Dick Santner, a vocational specialist. He outlined a total of 10 tasks she had performed in the past 15 years of her working life. And given those tasks and Dr. Bene's restrictions, Mr. Santner was of the opinion that there were very few, if any, jobs claimant was able to perform. He opined that she might be able to be a greeter at a retailer such as Wal-Mart, but given the labor market in Burlington, Kansas, where claimant resides, that was an unlikely prospect. Mr. Santner did not consider the job markets in Topeka or Emporia as they are 60 miles away.

After considering this evidence, the ALJ concluded that claimant had established a compensable claim, specifically finding timely notice and written claim. He also found claimant was entitled to the TTD benefits she received and was further entitled to a 15 percent permanent partial impairment to the left upper extremity (arm) and 8.5 percent permanent partial disability to the right upper extremity (arm).[22] This impairment reflects an average of the impairment opinions expressed by both Drs. Bene and Ketchum and recognizes the fact that "[b]oth Drs. Bene and Ketchum believed claimant was unable to use her left arm for work purposes."[23]

The ALJ went to conclude that claimant was permanently and totally disabled by virtue of the statutory presumption set forth in K.S.A. 44-510c(a)(2). The ALJ noted that-

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[20] *Id.* at 12.

[21] Dr. Ketchum's March 19, 2009 IME Report at 3.

[22] Both of these ratings are to the 200 week level of the schedule set forth at K.S.A. 44-510d(a)(12).

[23] ALJ Award (Apr. 22, 2009) at 5.

> The only evidence from a vocational expert presented was from Dick Santner who stated in his report, "[f]rom the standpoint of employment that would be considered substantial and gainful, I do not believe Ms. Griffith has the capacity to perform that at this time." Mr. Santner stated the only job claimant could possibly perform would be as a Wal-Mart greeter. However, the nearest Wal-Mart was approximately 47 miles away from Ms. Griffith. There is no evidence in the record regarding respondent's ability, if any, to accommodate Ms. Griffith had she not been terminated.[24]

Respondent's first point on appeal deals with the underlying compensability of claimant's injuries. Respondent maintains claimant failed to establish that she suffered personal injury by accident which arose out of and in the course of her employment. Distilled to its simplest terms, respondent argues that claimant did not get hurt while working. Rather, she had recurring idiopathic ganglion cysts that are at the root of all her problems. In support of this contention is the testimony of Dr. Rosenthal. And respondent suggests that Dr. Bene concurs with Dr. Rosenthal's analysis.

The Board disagrees with respondent's recitation of Dr. Bene's opinions. Clearly claimant has had some problems with ganglion cysts. Those problems were apparently compounded by the surgeon's decision to leave mesh in her wrist. And while Dr. Bene agreed with part of Dr. Rosenthal's observations with respect to the ganglion cysts, he also testified that her repetitive type of work played a "large role" in her bilateral carpal tunnel problems. That portion of his testimony cannot be ignored. Dr. Ketchum echoed that opinion when he concluded that at best she was capable of one-handed work due to her left hand problems.[25]

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[26] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[27] K.S.A. 44-508(g) finds burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and

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[24] *Id.* at 8.

[25] Dr. Ketchum's March 19, 2009 IME Report at 3.

[26] K.S.A. 44-501(a).

[27] K.S.A. 44-508(g).

any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.[28] There is a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof.[29]

The Board agrees with the ALJ's conclusion that claimant's bilateral upper extremity condition arose out of and in the course of her employment with respondent including her ganglion cysts. And even if claimant suffered from idiopathic ganglion cysts, she suffered work-related aggravations of those conditions. Accordingly, the extent of her present condition, the nature and duration of her complaints coupled with the medical evidence is persuasive of her position in this matter.

Respondent next argues that claimant failed to give both timely notice and timely written claim as required by the Act. Claimant gave respondent a note on September 19, 1995 indicating that the medical bill was to be directed to workers' compensation. As noted in the Board Member's earlier Order, this document alone satisfies the statutory requisites for notice and written claim. K.S.A. 44-520 provides:

> **Notice of injury.** Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

Independent of *notice* of the accident, an injured employee must also file a timely written claim for his/her accident. The written claim statute, K.S.A. 44-520a, provides in part:

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[28] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991), *rev. denied* 249 Kan. 778 (1991).

[29] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh. denied* (May 8, 2007). K.S.A. 44-510c(a)(2).

> (a) No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

Both of these issues were addressed by both the ALJ and one Board Member in the appeal of the preliminary hearing. As noted by the ALJ, no further evidence was submitted on these issues. Simply put, claimant repeatedly advised her supervisors that she believed her bilateral hand condition was caused by work and asked that her bills be paid through workers compensation. Respondent continued to deny that the condition was work-related.

Claimant's testimony as to her efforts to notify respondent's representatives about her ongoing bilateral upper extremity problems is uncontroverted. Respondent simply denied her claim was work-related. The Board finds the ALJ's conclusion that claimant gave timely notice as required by K.S.A. 44-520 should be affirmed.

Respondent also contests the timeliness of claimant's written claim as required by K.S.A. 44-520a. The ALJ adopted the Board Member's analysis as contained within its earlier Order dated February 20, 2004 and concluded that claimant's claim, filed on September 17, 2003, was timely. The Board Member's analysis was as follows:

> Finally, the Board considers the requirements of K.S.A. 44-520a, which require that written claim be submitted to respondent within 200 days of the date of accident or, where compensation has been suspended, within 200 days after the last date of the payment of compensation. The handwritten note by claimant on September 19, 1995, to Mr. Reynolds, specifies that the attached medical bill from Plastic and Reconstructive Surgery Associates was to be directed to workers' compensation. This, in and of itself, would satisfy the requirements of K.S.A. 44-520a, as claimant's allegations of injury are an ongoing series through her last day worked.
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> Additionally, K.S.A. 2003 Supp. 44-557 requires that an employer file a report of accident with the Director of Workers Compensation within 28 days after receiving knowledge of an alleged injury. Here again, claimant time and again advised respondent of her ongoing difficulties. The only accident report ever filed by respondent was in 1992, associated with the cyst on claimant's left wrist. There was no indication in the record that any accident report was ever filed regarding claimant's additional and numerous upper extremity complaints, even after respondent was provided the medical records of Dr. Kennedy in 1997, indicating that claimant's typing, writing and keyboarding activities were aggravating her

> ongoing conditions. Under K.S.A. 2003 Supp. 44-557, failure to file an accident report as required extends the written claim time to one year from the date of accident. In this instance, claimant's termination was September 23, 2002. Her E-1 was filed with the Division of Workers Compensation on September 17, 2003, within one year of claimant's last day worked and, therefore, her date of accident.[30] The Board, therefore, finds pursuant to K.S.A. 44-520a and K.S.A. 2003 Supp. 44-557, that claimant's written claim was timely filed in this instance.
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> The Board finds based upon the evidence in the record, that claimant has proven that she suffered accidental injury arising out of and in the course of her employment and that she provided timely notice and timely written claim regarding those accidental injuries. The Board, therefore, affirms the Order of the Administrative Law Judge.[31]

Respondent asserts that it was under no duty to file any sort of accident report relative to claimant's alleged injuries and therefore, under K.S.A. 44-520a, her claim was not timely filed. In support of this contention, respondent refers the Court to *Pence*,[32] and suggests that because claimant lost no work time due to her injury, no accident report was necessary. Thus, her time to file any written claim was limited to 200 days.

And as for respondent's contention claimant was not disabled and therefore it had no duty to file an accident report, thus limiting the time in which claimant had to file her claim, the Board finds that claimant did, in fact, miss work and was incapacitated. K.S.A. 44-557(a) requires an accident report when a worker is *partially* incapacitated beyond the day of the accident. According to her testimony, Dr. Mitra took claimant off work on July 22, 1992 and referred her to Dr. White. She was off work again in December of 1993.[33] These periods may not have been solely for her ganglion cyst. But her deposition makes it clear that claimant was gone from work for physical therapy for her tendonitis complaints while being treated by Dr. Kennedy.[34] He recommended that she have rest and immobilization in order to minimize her ongoing bilateral complaints. Indeed, claimant wore splints on both wrists up until she was terminated in 2002. Based on this evidence, the Board finds claimant was incapacitated and respondent had a duty to file an accident report.

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[30] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

[31] Board Order, 2004 WL 485738 (Kan. WCAB Feb. 20, 2004) at 4-5.

[32] *Pence v. Rescar, Inc.*, No. 1015047, 2007 WL 435887 (Kan. WCAB Jan. 31, 2007).

[33] P.H. Trans. (Dec. 18, 2003), Cl. Ex. 4 (Off slip).

[34] Claimant's Discovery Depo. (May 18, 2004) at 58.

The Board has considered respondent's argument as well as the entire record and affirms the ALJ's findings in his Award and his adoption of the Board Member's earlier analysis. Under the applicable law, claimant's date of accident was her last date of work, September 23, 2002. Her E-1 was filed with the Division on September 17, 2003, within one year of her (legal) date of accident. As noted above, respondent did not file any accident report addressing the bilateral complaints claimant repeatedly informed them about. The only accident report deals with the ganglion cyst in the left wrist. Even if the E-1 had not been filed on September 17, 2003, the document claimant gave to Dave Reynolds on September 19, 1995, was sufficient to satisfy the statutory criteria.[35]

Respondent next contests the ALJ's determination that claimant is permanently and totally disabled. As the ALJ noted, claimant sustained a bilateral upper extremity impairment and as such, she is presumptively and totally disabled pursuant to K.S.A. 44-510c.

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[36]

The ALJ's conclusion that claimant is permanently and totally disabled is supported by the greater weight of the credible evidence in this record. Dr. Rosenthal simply does not believe claimant to be a credible individual and dismissed her complaints as "unexplainable" and unrelated to work. She refused to impose any restrictions or an impairment rating as claimant had not undergone a functional capacity evaluation. The Board finds her opinions are not helpful on this issue. Drs. Ketchum and Bene essentially agree that claimant has a significant impairment and that substantial gainful employment would be, at best a challenge given her limitation of one-handed work. Mr. Santner suggested that the only job she could hope to do would be the Wal-Mart greeter, with the

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[35] Although that document was tendered in advance of her "legal" date of accident, that phenomenon is not unusual in the workers compensation situation and is a function of the "legal fiction" surrounding a claimant's date of accident in repetitive trauma claims.

[36] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

only possibility for that job existing nearly 50 miles away from claimant's home. The prospect of a single job 50 miles away from home, absent any further evidence that such a job is available and would pay a wage that justified a 100 mile commute, does not rebut the presumption raised by the statute. There is no evidence within this record that respondent was willing to accommodate claimant's one-handed restrictions. The Board concludes respondent failed to rebut the statutory presumption of permanent total disability and the ALJ's Award is, therefore, affirmed on that issue.

The ALJ also concluded that claimant was entitled to the TTD benefits she received from April 15, 2004 to April 18, 2008. Accordingly, respondent's request for an offset or credit against any permanency that might be awarded was denied. Respondent argued that the treatment claimant received during that period did not really benefit her so she must have been at maximum medical improvement during that time. The ALJ reasoned that "[t]he fact the attempt [at treatment] was not successful is not a sound rationale for finding temporary total compensation was unjustified." The Board wholeheartedly agrees. The results of any given procedure or treatment cannot form the basis for a respondent's liability for TTD under the Act. The ALJ's determination regarding TTD is affirmed.

In summary, the ALJ's Award is affirmed in all respects.[37] Claimant established a compensable injury, for which she provided timely notice and a timely written claim. Although she bears a 15 percent impairment to her left upper extremity and an 8.5 percent permanent impairment to her right upper extremity, she nonetheless is permanently and totally disabled. She is entitled to the TTD benefits contained in the Award and is thereafter entitled to permanent total disability benefits, not to exceed $125,000.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated April 22, 2009, is affirmed.

[37] The Award is affirmed in every respect other than as it relates to the ALJ's legal conclusion that respondent timely tendered Dr. Rosenthal's report. The parties did not raise this as an issue at either oral argument or in their briefs to the Board. And although claimant's counsel objected to certain statements made by Dr. Rosenthal during her deposition (p. 9-10) and advanced that objection in his brief to the board, that objection is overruled. Dr. Rosenthal's statements merely explained her findings and the statute, K.S.A. 44-515 only requires that a party produce an identical report to the opposing side. The statute does not limit the physician's testimony with respect to the physical findings or conclusions.

IT IS SO ORDERED.

Dated this _____ day of October 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Frank D. Taff, Attorney for Claimant
John D. Jurcyk, Attorney for Self-Insured Respondent
Brad E. Avery, Administrative Law Judge